STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

PEOPLE OF THE STATE OF NEW YORK by
ANDREW M. CUOMO, Attorney General of
the State of New York,

Petitioner,

-against-

DECISION and ORDER
INDEX NO. 3778-07
RJI NO. 01-07-089339

DELL, INC. and DELL FINANCIAL SERVICES, L.P.,

Respondents.

Supreme Court Albany County All Purpose Term, February 27, 2008

APPEARANCES:

Andrew M. Cuomo, Esq.
Attorney General of the State of New York
(Amy Schallop, Esq. AAG)
Attorney for the Petitioner
The Capitol
Albany, New York 12224

Albany County Clerk
Document Number 10195399
Rcvd 05/28/2008 9:08:29 AM

Kelley Drye & Warren LLP
(Steven P. Caley, David Zalman and Lewis Rose, Esqs.)
Attorneys for Respondent Dell, Inc.
101 Park Avenue
New York, New York 10178
and
Washington Harbour, Suite 400
3050 K Street, NW
Washington, DC 20007

Featherstonhaugh, Wiley & Clyne LLP
(James D. Featherstonhaugh and Randall J. Ezick, Esqs.)
Co-Counsel for Respondent Dell, Inc.
99 Pine Street
Albany, New York 12207

Reed Smith, LLP
(Robert Miller, Mark Melodia and Andrew B. Messite, Esqs.)
Attorneys for Respondent Dell Financial Services L.P.
599 Lexington Avenue
New York, New York 10022

TERESI, J.:

Petitioner commenced the instant special proceeding alleging that respondents have repeatedly engaged in fraudulent, deceptive and illegal business practices in violation of Executive Law § 63 (12) and General Business Law article 22-A and seeking injunctive relief, restitution, penalties, disgorgement of excess profits, an accounting to identify consumers entitled to restitution and an award of costs and disbursements. The proceeding involves the practices engaged in by respondents in the sale, financing and warranty servicing of computers and related electronic equipment. Respondents have each separately cross-moved for an order dismissing the proceeding. The proceeding was initially removed to Federal Court and thereafter was remanded back to Supreme Court.

A special proceeding brought pursuant to either Executive Law § 63 (12) or General Business Law article 22-A is the functional equivalent of a motion for summary judgment in an action with the same procedural standards applicable (see Matter of People v Applied Card Sys., Inc., 27 AD3d 104, 106, [3d Dept 2005]; see also Matter of Port of N. Y. Auth. [62 Cortlandt St. Realty Co.], 18 NY2d 250, 255 [1966]; National Enters. Inc. v Clermont Farm Corp., 46 AD3d 1180, 1183 [3d Dept 2007]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). The petition and cross-motions to dismiss must be

supported by "evidentiary proof in admissible form" (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1067 [1979]). Conclusory assertions without factual proof are insufficient (see Matter of Sour Mtn. Realty v New York State Dept. of Envtl. Conservation, 260 AD2d 920, 923-924 [3d Dept 1999]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). The Court will then view the evidence in a light most favorable to the party opposing the motion, giving them the benefit of every reasonable inference, and determine whether there is any triable issue of fact which would warrant denial of a motion for summary judgment and necessitate a trial (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

Petitioner has submitted numerous affidavits from consumers alleging various deceptive, misleading and unlawful conduct by the respondents. Petitioner has also submitted a number of unsworn complaints prepared on forms which state immediately before the signature that any false statements would be punishable as a class A misdemeanor under section 175.30 and/or section 210.45 of the Penal Law. Respondents object to the Court considering such complaints as they are not sworn. Petitioner contends that such complaints are the substantial equivalent of an affidavit and thus may be relied upon as admissible proof in support of the application, citing People v Sullivan, (56 NY2d 378, 383 [1982]). However, such decision involved construction of a statute referring to undefined oaths or affirmations relating to an application for a search warrant. The Appellate Division, Third Department, has stated:

"Notwithstanding the existence of some caselaw tending to equate an affirmation with an

> affidavit (see, People v Sullivan, 56 NY2d 378, 383-384; Matter of Kurt EE., 199 AD2d 945), the inescapable fact is that CPLR 3212(b) very specifically requires a summary judgment motion to 'be supported by affidavit'. In addition, the provision of CPLR 2106 that attorneys, physicians, osteopaths and dentists may submit an affirmation 'with the same force and effect as an affidavit' clearly manifests the Legislature's intention that no other class of witness be granted that privilege. Although there is much to be said for permitting written affirmations by all persons, the Legislature has repeatedly failed to take action on proposals to that effect (see, Alexander, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR 2106, at 816)." (Sam v Town of Rotterdam, 248 AD2d 850, 851 [3d Dept 1998]).

The Third Department's statements are only dicta, as they held that the party opposing the motion for summary judgment failed to raise the objection, thereby waiving the issue. The reasoning is, however, compelling and is clearly supported by People v D.B.M. Intl. Photo Corp., (135 AD2d 353, 354 [1st Dept 1987]). It is therefore determined that only the affidavits will be considered on the liability phase of this proceeding. Nevertheless, a restitution and penalty phase, if required, need not comply with all of the procedural requirements of a trial or a motion for summary judgment. As such, the unsworn complaints may be considered during such phase (see e.g. People v Introductions, [Index No. 3571-96, Sup Ct, Albany County, March 30, 1999, Teresi, J.]). The Court also notes that respondent Dell has submitted an unsworn "declaration" to which there has been no objection.

Petitioner has submitted copies of typical advertisements published on behalf of Dell. The ads offer such promotions as free flat panel monitors, additional memory, significant rebates and instant discounts in very large point print in contrasting color. They also include offers of very attractive financing, such as no interest and no payments for a specified period of time in prominent positions and similar large fonts and colors. While there is fine print below the financing offers limiting them to "well qualified" customers, and after certain litigation, "best qualified" customers, nothing in the ads indicate what standards are used to determine whether a customer is well qualified. There is also no indication of how many customers are likely actually to qualify.

Petitioner's submissions indicate that as few as 7% of New York applicants qualified for some promotions. Petitioner has submitted several affidavits from consumers alleging that they saw these ads and were persuaded to call or access Dell's internet site to shop for a computer because of the financing promotions. However, most applicants, if approved for credit, were offered very high interest rate revolving credit accounts ranging from approximately 16% up to almost 30% interest without the prominently advertised promotional interest deferral.

Petitioner contends that respondents improperly applied an ultra restrictive credit policy to limit the number of applicants who actually benefitted from the promotions. However, in the absence of any deception or misrepresentation, there is nothing improper about applying restrictive qualifications for credit.

In any event, respondents contend that the restrictive credit policies are governed by CIT Bank, the actual lender for Dell promotions and that Dell does not have any say in how credit is approved. Such claims are belied by the record. Dell Financial Services, L.P. is a joint venture of Dell and CIT Bank. Dell has a 70% interest in the joint venture, including its profits, and also provides hundreds of millions of dollars of financing for its sales. Moreover, the varying percentages of customers who qualify for different promotions indicates that credit approval is often based upon the product in question, and not the customer's creditworthiness. As noted above, promotions applicable to Dell products across the board have approval rates of as little as 7%. However, promotions with no interest for as long as 24 months applicable only to Dell TV's and XPS computer systems have consistently had approval ratings between 52% and 62%. Respondents have not offered any explanation of why CIT Bank would find purchasers of such items less risky than purchasers of other items. While petitioner has not offered any evidence as to who bears the costs

of interest free financing, it is almost certain that such costs and expenses are born by Dell, and not CIT Bank. It is thus apparent that Dell is the true lender (see Matter of People v County Bank of Rehoboth Beach, Del., 45 AD3d 1136 [3d Dept 2007]) and has considerable control over how many customers are approved for financing promotions.

Moreover, Dell certainly has knowledge of the relative numbers of customers who qualify for various promotions. It is therefore determined that Dell has engaged in prominently advertising the financing promotions in order to attract prospective customers with no intention of actually providing the advertised financing to the great majority of such customers. Such conduct is deceptive and constitutes improper "bait advertising" (see e.g. Electrolux Corp. v Val-Worth, Inc., 6 NY2d 556, 566 [1959]; Goldberg v Manhattan Ford Lincoln-Mercury, 129 Misc 2d 123, 127 [Sup Ct, New York County 1985]).

The Court does not hold that it is improper to advertise attractive financing terms for which not all customers qualify. However, the advertising is deceptive when the seller/advertiser has significant control over or knowledge of the restricted number of customers who qualify and fails to include any meaningful information with respect to the likelihood of obtaining the advertised financing (see Matter of People v Applied Card Sys., Inc., 27 AD3d at 106-108).

Petitioner has also made a prima facie showing of other repeated deceptive acts concerning financing Dell equipment. While respondents contend that a customer can not apply for promotional financing, but rather merely applies for a standard revolving credit account which may or may not include favorable terms, respondents' application process does not make this legal distinction clear to the applicant. The print out of the online application submitted by petitioner involves an offer of no interest financing followed immediately by an active link labeled "Apply Online Now!" creating

an inference that the customer is applying for no interest financing. This link takes the customer to an application for a "Dell Preferred Account" which boasts "instant approval for qualified applicants," essentially the same language used with respect to the promotional financing "disclaimer." It is designated a "preferred" account, implying that it is better than a regular account. While the fine print states that the account may or may not include promotional financing, the application does not expressly state that it is not an application for the advertised financing. Petitioner has submitted numerous affidavits from customers who believed that they were applying for the 0% interest financing. The Court finds that under all of the circumstances, such beliefs were not unreasonable.

Petitioner has also submitted numerous affidavits from customers who believed that they applied for the promotional financing over the telephone. Some of them told the Dell representative that they were only interested in the offer if they received the promotional financing. Most alleged in effect that they were not clearly informed that they were applying for a regular revolving line of credit with no beneficial features. While it does not appear that such misperception as to the nature of the credit application standing alone would cause a consumer any injury, it would change their rights with respect to receiving written notice of the reasons why promotional financing was denied under the Equal Credit Opportunity Act (15 USC § 1691 [d]) (see infra).

More importantly, petitioner has submitted affidavits alleging that consumers were deceived with respect to whether they were actually approved for the promotional financing. The online application process included a screen which stated "Congratulations, (consumer's name!) You've been approved for a Dell Preferred Account!" in a large print and contrasting color. This was subsequently modified to remove the congratulatory language. If promotional financing was not

approved, the screen then stated "Please note that your account does not qualify for or include any promotional financing features." Thereafter, the screen set forth the credit limit and the APR and stated "Promotional Financing Features: NOT INCLUDED." Certainly a careful consumer would read all of the information and realize that they had not been approved for the no interest promotion. However,

> "[t]he test is whether the act complained of 'has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud. Executive Law § 63 (12) was meant to protect not only the average consumer, but also "the ignorant, the unthinking and the credulous"' (People v General Elec. Co., 302 AD2d 314, 314 [2003] [citations omitted], quoting Guggenheimer v Ginzburg, 43 NY2d 268, 273 [1977])." (Matter of People v Applied Card Sys., Inc., 27 AD3d at 106).

Viewing the process as a whole, including the initial link to apply for an advertised promotion and the statement that the consumer was approved for a "preferred" account, it is certainly possible, if not likely, that a significant number of consumers would accept the credit account believing that they had qualified for the no interest financing. This is born out by the fact that Dell has prepared scripts for its sales representatives specifically addressed to consumers who believed that they had qualified for promotional financing following online applications. It seems unlikely that they would have done so had such misperceptions been truly isolated and unusual.

Petitioner has also submitted many affidavits from consumers who purchased Dell equipment over the telephone alleging that they believed they were applying for promotional financing and that the sales representative told them they were approved, but failed to set forth the terms of the approval, including the fact that they were not approved for the promotional financing. A smaller number of consumers have alleged that they were actually told that they were approved for promotional financing when they had not been. Such allegations are supported by logs maintained

by Dell which show numerous complaints about being charged interest when the customers believed they had been approved for promotional financing and prepared scripts apologizing for any misrepresentations concerning financing. Moreover, some of the affidavits submitted by petitioner indicate that such misrepresentations caused consumers actual injury as they had credit available for considerably lower interest rates. It is therefore determined that petitioner has made a prima facie showing that respondents have engaged in deceptive practices with respect to the advertising and issuance of credit.

Petitioner asserts that respondents have repeatedly opened Dell Preferred Accounts for customers without authorization and thereafter charged equipment to them. Petitioner has submitted only two affidavits supporting such claim. In one instance, the customer provided the information to apply for the financing promotion and decided to purchase the equipment with his credit card. Through error, the customer was shipped two systems, with one charged to the credit card and one charged to the Dell account without permission. The second affidavit involved a similar application for a Dell account with the customer deciding to use a credit card. By mistake, the equipment was charged to a Dell account instead. There is no indication that these were anything other than isolated good faith errors which would not support the imposition of any penalty or injunctive relief. Moreover, it appears that all financial issues have been fully resolved such that there is no basis for any restitution. Petitioner has therefore failed to meet its burden on such claim.

Petitioner has also raised numerous objections to respondent Dell's technical support and warranty service, contending that Dell has engaged in deceptive and false advertising with respect to the availability of technical support, that it has deprived customers of timely repairs and failed to provide "next day" service, and that it has failed to disclose that customers may be required to

disassemble their own computer before on site service will be provided. Such claims are supported by affidavits alleging long waits on hold for technical support, numerous transfers from one department to another with additional holds, the necessity for repeated calls and numerous instances in which Dell refused to provide on site service because it could not or had not yet determined what parts needed to be replaced.

Petitioner contends that Dell has engaged in deceptive and false advertising by claiming that it has award winning technical support available 24 hours a day, seven days a week. However, petitioner has not shown that Dell's technical support has not won any awards. Moreover, while consumers may have to wait on hold to actually receive technical support, they may do so at any hour of the day or night. As such, petitioner has not shown any deceptive, fraudulent or illegal practices with respect to the general provision of technical support. The Court finds that neither Executive Law § 63 (12) nor General Business Law article 22-A were intended to create a cause of action to enforce the provision of superior customer service. Such aspect of a business is for the marketplace to determine, not the petitioner or the courts.

To be distinguished, however, is the circumstance in which poor customer service is intended to or has the effect of denying customers their warranties. Petitioner has submitted affidavits alleging that consumers have gotten so frustrated with repeated requirements of calling technical support to troubleshoot a computer, with its attendant long holds and transfers, that they have given up on trying to get warranty repairs and have gone to third-party repair services to fix their equipment, or even worse, have stopped using the equipment and purchased new replacement equipment. Moreover, numerous affidavits have alleged that Dell regularly refuses to provide warranty service unless and until it has been able finally to determine the cause of a problem by

telephone troubleshooting, rather than properly utilizing telephone troubleshooting to diagnose and/or repair obvious issues. Petitioner has also submitted affidavits alleging that Dell also informs customers that the problems are software related and not covered by the warranty even though they actually involve hardware failures. The affidavits also allege that Dell has refused to provide warranty service on the ground that the warranty had expired, even though the customer first complained about the issue before the warranty had ended. The Court finds that petitioner has made a prima facie showing that Dell has repeatedly refused and failed to provide service as required by the terms of its warranties.

Petitioner also contends that Dell has engaged in deceptive advertising with respect to such warranties. Dell has advertised its on site warranties as providing "next day" service, or used words of similar effect. However, Dell has often required customers to call technical support repeatedly in an attempt to troubleshoot the problem before it will provide on site service. Petitioner has submitted affidavits alleging that it has taken weeks, months, or even years actually to receive on site service. This is certainly not within the reasonable and normal expectation of a consumer who purchases a service contract calling for "next day" service.

The terms of the warranty provided to the customer before sale also state that the customer will be required to cooperate with telephone based troubleshooting. Dell does not provide any detail as to what such telephone based troubleshooting may entail. However, petitioner has shown that Dell requires much more than merely discussing the nature of the problem over the telephone. Rather it is alleged that Dell has required inexperienced consumers to disassemble their entire "hard drive" and "motherlode." Such troubleshooting is not limited to remote connections or keyboard manipulations but rather often requires the consumer to remove and reinstall internal components

requiring the use of tools. Such measures do not appear to be within the reasonable and normal expectations of what would constitute "telephone based troubleshooting." Moreover, petitioner has shown that Dell construes this to require successful troubleshooting, refusing to provide on site service unless and until it has determined the nature of the problem over the phone, even if the problem eludes diagnosis remotely. Certainly, it would be reasonable for a customer to assume that under such circumstances, when telephone based troubleshooting had failed, a service technician would be dispatched to determine the cause of the problem. The Court therefore finds that petitioner has made a prima facie showing that Dell has engaged in deceptive advertising with respect to its warranties.

Petitioner has alleged that Dell has fraudulently refused to honor rebates and has failed to issue rebate checks in a timely manner as required by the second General Business Law § 391-p.[1] Such statute became effective September 1, 2005. Essentially all of the affidavits submitted by petitioner involve sales in 2003 and 2004. Two affidavits involve sales in August, 2005, but neither of them indicate specifically when the rebate submissions were made. As such, petitioner has failed to show any violation of General Business Law § 391-p. However, petitioner has offered proof that Dell has repeatedly denied timely rebate requests which included all of the required documentation on stated grounds that they were never received or that they were missing items, that Dell has repeatedly made only partial rebate payments, and that customers have had to wait as long as three years to get their promised rebates. The submissions show an alarming pattern of failure to provide the rebates until after a complaint is made to the Attorney General's Office. Thus, in many

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[1]Another unrelated statute designated General Business Law § 391-p was enacted shortly before the statute applicable to rebates.

instances, only the most diligent customers actually receive the rebate to which they were entitled. The Court finds that petitioner has made a prima facie showing of fraudulent or deceptive practices in administering the rebate program.

Petitioner further contends that Dell has engaged in fraudulent and deceptive practices by using refurbished and sometimes defective parts to repair equipment under warranty, even if the equipment is defective "right out of the box." However, Dell's warranties expressly state that refurbished parts may be utilized in any warranty repairs. Moreover, since a customer has the right to return a defective system for refund if it is defective "right out of the box," the fact that they choose to have it repaired under the express warranty can not constitute a fraudulent or deceptive practice. Petitioner has also failed to show that the incidence of defective refurbished parts is significantly greater than the incidence of defective new parts, nor has it shown that such defective refurbished parts are not regularly replaced within the warranty. As such, petitioner has not met its burden of establishing that the use of refurbished parts to repair equipment is fraudulent or deceptive.

Petitioner asserts that Dell Financial Services has engaged in fraudulent, deceptive and illegal activity in its debt collection practices by continuing to attempt to collect debts which it knows or has reason to know are not justly due and owing as a result of Dell's patterns of delay in providing credit for returned merchandise. Petitioner has not shown that any consumers were defrauded or deceived by such practices. However, General Business Law § 601 (3) makes it unlawful to disclose or threaten to disclose information affecting a debtor's reputation for credit worthiness with knowledge or reason to know that the information is false. General Business Law § 601 (5) makes it unlawful to disclose or threaten to disclose information affecting a debt known to be disputed without disclosing that fact. General Business Law § 601 (6) prohibits communication with a debtor,

a family member or a member of the household with such frequency or at such unusual hours as can reasonably be expected to abuse or harass a debtor.

Petitioner has submitted numerous affidavits indicating that Dell Financial Services has reported or threatened to report late payments to credit reporting agencies even though they have been informed by the alleged debtor that the equipment was returned to Dell for full refund and that no sums are due and owing. While only a very small number of affidavits allege that the customers followed the required procedure of mailing a billing dispute to the correct address, the record shows that Dell Financial Services must have been aware that Dell regularly failed to issue credits for returned merchandise in a timely manner. Moreover, several affidavits alleged that the customers provided or offered to provide documentation of the fact that Dell had actually received the returned merchandise. The affidavits allege that notwithstanding such facts, which would constitute reason to know that information concerning a debt was false, Dell Financial Services reported and threatened to report allegedly late payments to credit reporting bureaus.

Petitioner has also submitted numerous affidavits alleging that consumers received incessant telephone calls demanding payment, even though the amounts were not justly due and owing. They allege numerous calls per day starting early in the morning and going until late at night which could reasonably be expected to abuse or harass the consumer (see Matter of People v Applied Card Sys., Inc., 27 AD3d at 109).

15 USC § 1681s-2 requires that any business which regularly furnishes information to credit reporting agencies must submit corrected information promptly. Petitioner has submitted affidavits indicating that false credit information was not corrected for months or even years on several occasions. Petitioner has thus made a prima facie showing of repeated violations of such statutes.

The petition also alleges that respondents have failed to provide notice of the reasons for an "adverse action," that is the denial of promotional financing, as required by the Equal Credit Opportunity Act (15 USC § 1691 et seq.) and the Fair Credit Reporting Act (15 USC § 1681 et seq.). Initially, it is questionable whether the New York State Attorney General has standing to enforce the Equal Credit Opportunity Act. Such statute authorizes an injured party or the United States Attorney General to enforce it. Moreover, the failure to provide notice of the reasons for a denial of credit would not constitute an independent wrong or a deceptive or misleading business practice in the absence of the federal statute which would provide an independent basis for the Attorney General's lawsuit (cf. Morelli v Weider Nutrition Group, 275 AD2d 607 [1st Dept 2000]).

In any event, the applications for credit were technically for a general account, and not specifically for the promotional financing. As such there was no adverse action within the meaning of the statutes. Moreover, even if it were considered a denial of the initial application, with respect to almost every affidavit submitted by petitioner, the affiant actually accepted the "counter offer" of a regular account, which eliminates any duty to provide notice of the reasons for a denial of credit (see Diaz v Virginia Housing Development Authority, 117 F Supp 2d 500, 504 [2000]). Petitioner has therefore failed to make a prima facie showing of repeated unlawful conduct.

Based upon the foregoing, petitioner has made a prima facie showing of numerous and repeated instances of misleading, deceptive and unlawful business practices in many areas. However, petitioner has failed to show such practices with respect to overly restrictive credit requirements, opening accounts without authorization, general claims of poor customer service, violations of General Business Law § 391-p, the use of refurbished parts to make repairs under warranty, and providing notice of adverse credit actions. As such, the cross-motions to dismiss shall

be granted to the extent that such claims shall be dismissed. Concerning the remaining claims, the burden is shifted to respondents to raise a triable issue of fact with respect to petitioner's claims or respondents' affirmative defenses.

Respondents contend that recovery of any penalty or restitution with respect to many of the instances of improper conduct is barred by the three year statute of limitations. There is appellate authority which appears to hold that all claims under Executive Law § 63 (12) are subject to the residual six year statute of limitations of CPLR § 213 (1), while all claims under General Business Law § 349 are subject to the three year statute of limitations for recovery of a liability imposed or created by statute (see e.g. Matter of People v County Bank of Rehoboth Beach, Del., 45 AD3d at 1138; Morelli v Weider Nutrition Group, 275 AD2d at 608). However, the Court of Appeals in State of New York v Cortelle Corp., (38 NY2d 83 [1975]) made it quite clear that in determining the applicable statute of limitations, the court must look to the essence of the claim, and not the form in which it is pleaded. Thus, the six year statute of limitations would only apply if the conduct was sufficient to constitute common law fraud (id.; see also Gaidon v Guardian Life Ins. Co. of Am., 96 NY2d 201, 208-210 [2001]; State of New York v Daicel Chemical Indus., Ltd., 42 AD3d 301, 303 [1st Dept 2007]).

"The essential elements of a cause of action for fraud are 'representation of a material existing fact, falsity, scienter, deception and injury' (Channel Master Corp. v Aluminium Ltd. Sales Corp., 4 NY2d, at 407)" (New York Univ. v Continental Ins. Co., 87 NY2d 308, 318 [1995]). The only acts alleged by petitioner which meet these elements are the limited number of instances in which purchasers were expressly and falsely told by telephone representatives that they qualified for promotional financing, rebates or free shipping. The remaining claims are all based upon statutory

provisions making deceptive or misleading conduct, which does not rise to the level of common law fraud, subject to restitution and penalties or upon other statutory violations. It is therefore determined that the remaining claims of deceptive and misleading conduct are subject to a three year statute of limitations. Pursuant to 15 USC § 1691e (f), the claims for violations of the Fair Credit Reporting Act are subject to a two year statute of limitations. Thus any restitution, disgorgement or penalties relating to acts which occurred more than the applicable period before commencement of this proceeding shall be barred. However, the Court finds that acts which occurred more than three years ago may still be considered to establish a course of conduct of repeated deceptive, misleading or unlawful acts even if petitioner may not recover anything based upon such specific acts due to the expiration of the statute of limitations (see Sullivan v Sullivan, 188 AD2d 953, 954 [3d Dept 1992]).

Respondents further contend that a class action settlement concerning claims of deceptive advertising of financing bars certain of petitioner's claims. While such settlement would bar recovery of restitution for any members of the class, it does not prevent petitioner from seeking injunctive relief, recovering penalties and costs or seeking disgorgement of excess profits (see Matter of People v Applied Card Sys., Inc., 41 AD3d 4, 6-8 [3d Dept 2007]). As such, the affirmative defense shall be limited to restitution on behalf of members of the class action settlement.

Respondent Dell Financial Services apparently contends that it can not be held liable for the acts of employees of respondent Dell, relying upon an alleged separate corporate structure. However, the submissions indicate that Dell Financial Services is a joint venture. The answer of Dell Financial Services admits the allegation of the petition that it is a limited partnership. Dell Financial Services has not shown that it would not be responsible for the acts of one of its partner's employees undertaken in the scope of the limited partnership's business. Moreover, Dell Financial

Services exercises considerable control over the sales representatives employed by Dell by preparing scripts for them to read when "selling" Dell Financial Services' services. Furthermore, the Dell sales representatives earn additional compensation when they convince a customer to finance his or her purchase through Dell Financial Services.

While Dell Financial Services has attempted to downplay this incentive, the submissions indicate that as much as 40% of a sales representative's income is based upon additional compensation for selling services such as extended warranties or Dell financing. Respondents have failed to provide any detail as to the actual compensation a sales representative receives for purchases financed through Dell Financial Services. They also seek to downplay the incentive by alleging that sales representatives lose any such compensation when a system is returned. Again, there is no specific information provided as to the percentages of systems that are returned following complaints of misrepresentations concerning financing. Such conclusory assertions are insufficient to raise any triable issue of fact. As such, Dell Financial Services may be held responsible for any misleading, deceptive or unlawful conduct of Dell sales representatives concerning financing purchases through Dell Financial Services.

Respondents also contend that in recent years they have started selective recording and auditing of sales representatives to ensure that there are no misrepresentations being made. However, such allegations are irrelevant to respondents' prior practices and the results of such audits have not been disclosed. Similarly, respondents contend that they have invested millions of dollars in their customer service and technical support functions, significantly reducing hold times and transfers. Again, such claims are irrelevant to the prior practices alleged by petitioner. As such, the claims fail to raise any issues of fact.

Respondents further contend that petitioner has submitted only a handful of complaints, amounting to less that 0.01% of Dell's total sales in New York State during the relevant period. However, petitioner is not required to establish misleading, deceptive or unlawful conduct in a significant percentage of a business' activities. Rather petitioner need only establish repeated improper conduct (see State of New York v Princess Prestige Co., 42 NY2d 104, 107 [1977]). Thus, the fact that respondents sell and finance many thousands of computers in the State of New York does not give them license to mislead or deceive a small percentage of their customers. Moreover, petitioner has alleged that it has received at least 1000 additional complaints since the instant application was prepared and it is likely that there are many more consumers who have been adversely affected by respondents' practices who have not made complaints to the Attorney General's Office. Furthermore, to the extent that the petition alleges unlawful conduct, it would appear that only a very small number of incidents would be sufficient to warrant relief. It is therefore determined that respondents' generalized objections fail to raise a triable issue of fact with respect to any viable defense to the proceeding.

Respondents have also submitted affidavits addressing the individual affidavits and complaints submitted by petitioner. The affidavit of Sergio Maldonado contains conclusory assertions that all customers have at all times been advised whether they were approved for financing either with or without the promotional benefits. For the most part, the affidavit relies upon "standard procedures," and claims that complainants "would have been" read scripts or "would have been" told the actual terms of the credit being extended. In short, there is no admissible proof in evidentiary detail by a person with knowledge of the facts indicating that the complaining customers were actually apprised of the terms of the credit and the fact that they had not been approved for

promotional financing.

With respect to the complaints about collections and credit reporting activities, Mr. Maldonado's affidavit is similarly conclusory. For the most part, the affidavit fails to offer any excuse for the significant delays in correcting credit reports and fails to address the fact that significant collections efforts were undertaken when charges were not even authorized by a consumer, where there was documentary evidence that the charges were improper, or where the consumer had submitted a written billing dispute. The affidavit of Adina Villareal is similarly deficient.

Respondent Dell Financial Services has also submitted an affidavit from Stephen Sippel alleging that respondent never initiates multiple phone calls in any one day unless there is no answer or no message is left. As above, the affidavit merely refers to standard procedures and fails to specifically address the numerous affidavits submitted by petitioner. Moreover, it does not address the actions undertaken by collections agencies on its behalf other than to claim that they were under contract not to violate any applicable laws. Mr. Sippel's conclusory assertions that all collection activity is suspended whenever a customer alleges the existence of some dispute fails to overcome the numerous specific affidavits alleging repeated attempts to have collection efforts halted based upon valid disputes.

It is therefore determined that respondents' conclusory submissions fail to raise a triable issue of fact as to whether respondents engaged in misleading and deceptive practices in the sale of computer equipment and offering of financing for such sales, and whether they engaged in unlawful activity in attempting to collect alleged debts.

Respondent Dell has submitted an affidavit from Amy Stringfellow addressed to claims of

failure to provide warranty service and rebates. The affidavit is supported by excerpts of Dell's records concerning specific customers. In many instances, Dell attempts to portray customers as difficult and rude or as refusing to cooperate in troubleshooting. However, neither the affidavit nor the records submitted address the claims that at such times, the customers had already been subjected to being on hold for hours, being transferred back and forth, or being required to engage in extensive, repetitive and ineffective troubleshooting for days, weeks or even months. Respondent's own submissions show that a customer was denied warranty service for a monitor on the ground that one year had passed, notwithstanding the fact that the monitor carried a three year warranty. The monitor was apparently replaced "in the interest of customer service" rather than under the warranty.

For the most part, the Stringfellow affidavit merely alleges that in most instances, customers eventually received warranty repairs. It does not deny that in one instance, such repairs were not provided until after the New York customer brought a lawsuit in Texas. It does not deny that many of such repairs were not effected until months after the initial complaint, that Dell claimed issues were software related when in fact they involved defective hardware, that software support, which incurred additional customer charges, was ineffective at repairing problems, that customers were told that they would have to continue ineffective troubleshooting to finally determine the defective part before on site service would be provided, or that warranty service was denied because of Dell's own billing errors.

With respect to rebates, the affidavit contends that the records show a timely rebate, when the customer had submitted two rebate requests and received only one of them in a timely manner. It is further argued that the fact that a customer requested a copy of his packing slip after the time for submission of a rebate request establishes that the customer's submissions were untimely.

However, the affidavit entirely fails to address the customer's allegation that he sent in the rebate submissions the same day he received the computer and was told the submissions were lost, requiring re-submission of all documentation. No explanation is given as to why rebate checks were sent for only a fraction of what was due or why claims of incomplete submissions were allegedly fabricated. There is no documentation of the numerous rebate checks which were allegedly sent and lost in the mail. While the affidavit does provide explanations for a small number of delays, there is no satisfactory explanation for the significant numbers of rebates which required complaints to the Attorney General's Office and many months to be received. Respondent Dell has therefore failed to raise any triable issue of fact with respect to whether it improperly and repeatedly failed to provide warranty service and timely rebates.

It is therefore determined that respondent Dell has engaged in repeated misleading, deceptive and unlawful business conduct, including false and deceptive advertising of financing promotions and the terms of warranties, fraudulent, misleading and deceptive practices in credit financing and failure to provide warranty service and rebates. Respondent Dell Financial Services has engaged in repeated misleading, deceptive and unlawful business conduct, including false and deceptive advertising of financing promotions, fraudulent, misleading and deceptive practices in credit financing and improper debt collection practices.

While petitioner has shown that many customers are entitled to restitution, the record is not sufficient to allow the Court to determine the amount of such relief. Specific financial information with respect to the costs of third-party repairs which should have been performed under warranty, the interest rates available to specific consumers, and the rental value of computers deprived by failure to provide timely service has not been submitted. Moreover, it appears likely that there are

many more New York consumers who are entitled to restitution who are not included in the complaints submitted herein. Similarly, there is no evidence of the amount of improper profits earned by respondents which would be subject to disgorgement. While petitioner has not shown that a formal accounting is warranted (see Matter of People v. Condor Pontiac, Cadillac, Buick and GMC Trucks, Inc., 2003 NY Slip Op 51082[U] [Sup Ct, New York County 2003]), it has shown that much of the information needed to determine these issues is in the possession, custody or control of the respondents. As such, leave to conduct discovery within this special proceeding is appropriate. Petitioner is granted leave to serve within twenty (20) days notices for discovery and inspection of specified categories of documents and/or computer records. Full responses shall be provided within thirty (30) days of receipt of the demands. Such discovery shall be completed within four months of the date hereof.

If depositions are necessary, an application must be made to the Court following the discovery dispute/issue protocol below.

In the event of any discovery dispute, discovery issue or issue of any type, counsel shall immediately phone chambers to schedule a conference within seven (7) days of the dispute or issue arising. Before the conference, each party shall deliver to the Court a two (2) page statement of contentions. At the conference, each party shall be heard and the Court shall issue a decision, reserve decision or require a formal motion be filed.

Petitioner shall then make further submissions on or before December 1, 2008 setting forth the identity of each consumer, the amount of restitution to which they are allegedly entitled and the basis for such claim, as well as the amount of disgorgement sought, together with the factual basis for such claim. Respondents shall have until February 2, 2009 to respond to such submissions.

Thomas K. Murphy, Esq., 4 Atrium Drive, Albany, New York 12205 is hereby appointed referee to hear and determine the issue of the amount of restitution and disgorgement. The referee shall also determine the number of instances of misleading, deceptive and unlawful conduct to assist the Court in determining the amount of the penalties to be imposed. The fees of the referee are set at $225/Hour plus disbursements and shall be paid by the petitioner. People v. Introductions, Inc., 252 AD2d 631 (3rd Dept., 1998). This is because the referee will be required to thoroughly examine extensive complaint forms and documentation of innumerable records and take testimony from a multitude of citizens.

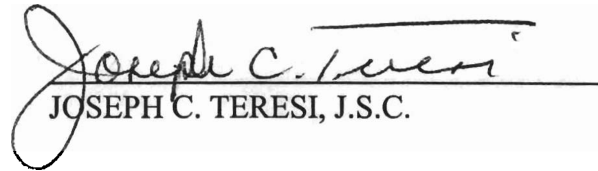
Petitioner is also entitled to injunctive relief to prevent any recurrence of the misleading, deceptive and unlawful conduct. However, in order to be effective, the terms of the injunction must be clear and unequivocal. Some of the issues involved herein defy a bright line test, such as how long a customer may be placed on hold or how many times a customer must attempt troubleshooting before obtaining warranty service. Accordingly, respondents shall be enjoined from advertising financing promotions without disclosing the approximate relative numbers of persons who are likely to qualify for such financing. They shall also be enjoined from failing to disclose in at least as prominent a fashion as the approval, the interest rate and presence or absence of promotional terms of any credit offer. In the event promotional financing is denied, such denial shall be communicated to the customer before the customer is informed that he or she has been approved for other financing. Respondent Dell shall be required to describe what constitutes "telephone based troubleshooting" if it continues to require the consumer to engage in such actions before receiving on site service, and shall no longer use the terms "next day service" or similar, unless service is provided within such time from the initial request for service in the majority of cases. Respondent Dell Financial Services

and its agents shall be enjoined from violating the provisions of General Business Law § 601, including reporting any customers as late in payment where the customer has alleged and offered documentation of the invalidity of any debt.

All papers, including this Decision and Order, are being returned to the Attorney General. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: May 23, 2008
Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition dated May 14, 2007; Petition verified May 14, 2007; Affirmation of Amy Schallop, Esq. dated May 14, 2008 with Exhibits A-1 - A-13, B-1 - B-24, C-1 - C-47, D-1 - D-45 and E-1 - E-38;
2. Notice of Cross-Motion dated September 12, 2007; Statement of Material Facts dated September 12, 2007; Affidavit of Downs Deering sworn to September 10, 2007 with Exhibits A-L annexed; Affidavit of Thomas Casey sworn to September 7, 2007 with Exhibit A annexed; "Declaration" of Roger Dunbar, undated, with Exhibits A-C annexed; Affidavit of Raymond Ciccocella sworn to September 10, 2007 with Exhibit A annexed; Affidavit of Todd Bartee sworn to September 5, 2007; Affidavit of Carlo Savino sworn to September 10, 2007 with Exhibit A annexed;
3. Answer of Respondent Dell verified September 12, 2007;
4. Affidavit of Amy Stringfellow sworn to September 11, 2007 with Exhibit Volumes I-IV annexed;
5. Notice of Cross-Motion dated September 12, 2007;
6. Answer of Respondent Dell Financial Services verified September 11, 2007;
7. Statement of Material Facts dated September 12, 2007;
8. Affidavit of Sergio Maldonado sworn to September 11, 2007 with Exhibits annexed;
9. Affidavit of Scott Schram sworn to September 11, 2007 with Exhibits A-T annexed;
10. Affidavit of Adina Villareal sworn to September 10, 2007 with Exhibit A annexed;
11. Affidavit of Stephen J. Sippel sworn to September 11, 2007 with Exhibit A annexed;

12. Affirmation of Amy Schallop, Esq. dated January 11, 2008 with Exhibits A-C annexed;
13. Affidavit of Mary Pape sworn to February 19, 2008 with Exhibits A and B annexed.